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In The

Supreme Court of the United States

October Term, 1995

CITY OF CARLSBAD, BRIAN WATSON, JAMES THOMPSON, FRANK MANNEN, RAYMOND PATCHETT, STEWART GARY, and ANN JENSEN,

Petitioners,

v.

WILLIAM EARL WARREN, III,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF 82 CALIFORNIA CITIES AS AMICI CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST

Amici cities are political subdivisions from throughout the State of California. They file this brief in support of Petitioners' petition for writ of certiorari pursuant to United States Supreme Court Rule 37.5. As described below, amici have a direct interest in the legal issues presented by this case and request that this Court grant the petition for writ of certiorari.

One of the issues presented by Petitioners in this case is the proper standard to be applied by the courts in deciding summary judgment motions in employment discrimination cases under Title VII. Public agencies in general, and amici cities in particular, employ vast numbers of individuals in California. California cities have been significantly impacted by the overall sharp upsurge in employment discrimination litigation against both public and private employers. During the twenty years between 1970 and 1990 the total number of employment discrimination lawsuits filed nationwide each year grew twenty-fold. Howard A. Simon and Yaroslav Sochynsky, *In-House Mediation of Employment Disputes: ADR for the 1990s*, 21 Employee Relations L.J., pp. 28, 30 (Summer 1995). Just from 1992 to 1993 the number of employment discrimination lawsuits filed nationwide jumped 22%. *Id.* Amici cities, as employers, are faced daily with defending against lawsuits brought by employees who claim to be the victims of discrimination.

Employment discrimination lawsuits impact the amici cities in many ways. For example, when such lawsuits proceed to trial, they disrupt the day-to-day functioning of cities by diverting precious human resource hours to

tasks necessary to assist counsel in preparing for trial. In addition, cities which are often forced to defend unmeritorious employment discrimination claims through trial become hesitant to make certain necessary and legitimate business decisions, out of fear of being sued. This fear is magnified by the ever shrinking financial resources available to cities.

Finally, employment discrimination lawsuits can be extremely expensive to defend through trial. In the State of California, for example, the cost of defending an employment discrimination lawsuit through trial often reaches or exceeds $300,000. Simon and Sochynsky, *supra*, at 30. Because of the well-documented financial difficulties experienced by cities in California in the current economic times, such onerous litigation expenses can lead directly to a decrease in the funding available for other, necessary, public services provided by cities.

Therefore, amici cities have a legitimate interest in ensuring that they are not foreclosed from employing summary judgment, a tool provided by the law to avoid defending unmeritorious lawsuits through trial, in employment discrimination cases. Cities should only be required to defend, through trial, those lawsuits where the plaintiff offers evidence sufficient to raise a question of material fact in regard to the elements necessary to establish intentional discrimination under the standards set forth by this Court.

For these reasons, amici respectfully submit this brief in support of Petitioners' petition for writ of certiorari.

SUMMARY OF ARGUMENT

This Court has set out specific standards to be applied by trial courts in deciding summary judgment motions. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). This Court has also set forth the burden of proof which a plaintiff/employee must meet in order to prevail on a claim of employment discrimination under Title VII. *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993). However, since this Court set forth the standards for employment discrimination cases in *St. Mary's*, the United States Circuit Courts of Appeals have applied conflicting standards in reviewing appeals from the grant of summary judgment in employment discrimination cases. Thus, there exists conflict and confusion among the Circuits regarding the appropriate burden of proof on summary judgment motions in employment discrimination cases which requires resolution by this Court. This confusion is demonstrated in this case by the Ninth Circuit's misapplication of the standards set forth by this Court in *St Mary's* and *Celotex*.

ARGUMENT IN SUPPORT OF GRANTING WRIT OF CERTIORARI

I. EMPLOYERS ARE ENTITLED TO SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES WHERE THEY HAVE SHOWN THERE EXISTS NO MATERIAL ISSUE OF FACT AND THAT THEY ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

Pursuant to Fed. R. Civ. P. 56(c), a defendant/employer is entitled to summary judgment in an employment discrimination case where there exists no genuine issue of material fact and the employer has demonstrated it is entitled to judgment as a matter of law. The purpose of summary judgment procedures is to allow for the expedient resolution of unmeritorious claims prior to trial. As such, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett, supra,* 477 U.S. at 327.

II. THIS COURT HAS CLEARLY SET FORTH THE PLAINTIFF'S BURDEN OF PROOF WHICH MUST BE MET IN ORDER TO PREVAIL ON A CLAIM OF EMPLOYMENT DISCRIMINATION

Respondent in the present case sued Petitioners for discrimination under Title VII arising out of Petitioners' failure to promote Respondent to the position of fire captain. In order to establish a prima facie case of discrimination for failure to hire or promote, in violation of Title VII, a plaintiff must show that (1) he or she is a

member of a protected class; (2) he or she applied for and was qualified for a job for which the employer was seeking applicants; (3) he or she was rejected for the position despite his or her qualifications; and (4) the position remained open and the employer continued to offer promotions to persons of the plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). As such, a plaintiff's burden in establishing a prima facie case is not great. *Texas Dep't Of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

Once the plaintiff has come forward with sufficient evidence to establish a prima facie case, a "presumption" of discrimination is established. *Texas Dep't Of Community Affairs v. Burdine, supra*, 450 U.S. at 254. In order to rebut that presumption, the defendant must come forward and produce admissible evidence showing that the adverse employment action was taken for legitimate, nondiscriminatory reasons. *Id.* Pursuant to Fed. R. Evid. 301, however, the ultimate burden of persuasion remains at all times with the plaintiff. *Id.* at 253.

Once the defendant has satisfied its burden of production regarding a legitimate nondiscriminatory reason for the adverse employment decision, the "presumption of discrimination" created by the *McDonnell Douglas* framework drops away. *Texas Dep't Of Community Affairs v. Burdine, supra*, 450 U.S. at 255, n.10. Plaintiff must then carry the "ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination." *St. Mary's Honor Center v. Hicks, supra*, 113 S.Ct. at 2747-2748. The factfinder must not only find that the employer's explanation of the adverse employment

action is unbelievable, but also that the adverse action was the product of unlawful discrimination. *Id.* at 2751.

The Ninth Circuit Court of Appeals in this case incorrectly applied the framework of proof in employment discrimination cases in its review of the District Court's grant of summary judgment on behalf of Petitioners. Other Circuit Courts of Appeals have also misapplied the standards set forth in *St. Mary's* so as to conflict not only with other Circuit Courts of Appeals, but also with *St. Mary's* itself.

The conflicts and the confusion both in and among the Circuit Courts of Appeals are more fully set forth below.

III. THE CIRCUIT COURTS OF APPEALS HAVE APPLIED *ST. MARY'S* TO REVIEW OF SUMMARY JUDGMENT ORDERS IN SUCH A MANNER SO AS NOT ONLY TO BE IN CONFLICT WITH EACH OTHER, BUT ALSO AS TO BE IN CONFLICT WITH THE HOLDING OF THIS COURT IN *ST. MARY'S*

Following this Court's holding in *St. Mary's*, there has arisen a conflict among the Circuit Courts of Appeals as to the appropriate standard to be applied when reviewing an employer's motion for summary judgment in an employment discrimination case. The conflicting decisions have been divided into two general categories for discussion below: (1) "Pretext Plus", whereby a plaintiff seeking to avoid summary judgment must present evidence not only that the defendant's asserted reason for the employment action is pretextual, but that it is a

pretext for intentional discrimination; and (2) "Pretext Only", whereby a plaintiff may avoid summary judgment simply by presenting evidence disputing the defendant's proffered explanation for the employment decision.

The Circuit Courts of Appeals in fashioning the "Pretext Plus" and "Pretext Only" positions have rejected the relative opposing standard by dismissing it as originating from dicta in *St. Mary's*. For example, the Seventh Circuit in *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994), adopted the "Pretext Only" position in regard to summary judgment. In rejecting "Pretext Plus" the court said:

> [a]s the dissent in *Hicks* points out, there is language in the Court's opinion that could support a finding that additional evidence of discrimination besides establishment of a prima facie case and rejection of the employer's proffered reasons for the plaintiff's discharge is required to prove intentional discrimination. However, such language is dicta. *Id.* at 1124, n.3.

Likewise, the Fifth Circuit in *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537 (5th Cir. 1994), while adopting a "Pretext Plus" position in regard to standards for a motion for judgment as a matter of law in an age discrimination case, rejected as "dicta" language cited from *St. Mary's* allegedly supporting a "Pretext Only" position. *Id.* at 542.

These conflicting standards, and their implications, are more fully discussed below.

A. "Pretext Plus"

Courts in the First, Fourth, Fifth, and Sixth Circuits have applied the "Pretext Plus" standard, which amici cities believe is the correct one following *St. Mary's*. The "Pretext Plus" standard is illustrated by the Sixth Circuit's decision in *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994). The male plaintiff in *Pierce* brought a claim under Title VII for reverse sex discrimination. Pierce, a supervisor, was demoted because of a determination by the defendant company that he sexually harassed a female employee. The only evidence presented by Pierce in opposition to the employer's summary judgment motion was that another female employee who engaged in similar conduct was not disciplined. The female employee, however, was not a management level employee. The court held:

> Even assuming, *arguendo*, that Pierce could establish a prima facie case, the district court was correct in determining that summary judgment in favor of Commonwealth was proper on the basis that Pierce offered no evidence that Commonwealth's proffered, nondiscriminatory justification for demoting Pierce was a pretext for discrimination. Because Commonwealth articulated a legitimate non-discriminatory reason for the demotion – an admitted violation by Pierce, who was a supervisor, of Commonwealth's sexual harassment policy – Pierce was required, in order to withstand summary judgment, to establish that the proffered reason was pretextual. Further, as the Supreme Court recently stated, establishing that the employer's reason was a pretext requires that a plaintiff do more than simply impugn the legitimacy of the

> asserted justification; in addition, the plaintiff must also adduce evidence of the employer's discriminatory animus. *Pierce v. Commonwealth Life Ins. Co., supra,* 40 F.3d at 804 (internal citations omitted).

Thus, the court clearly required plaintiff to show not only that the employer's reason was pretextual, but also that it was pretext for discrimination, in order to avoid summary judgment. Courts of the First, Fourth, and Fifth Circuits have required plaintiffs to make similar showings in order to avoid summary judgment in employment discrimination cases.[1]

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[1] *See, e.g., LeBlanc v. Great American Ins. Co.,* 6 F.3d 836, 842-843 (1st Cir. 1993) ("In this circuit, we have always required not only 'minimally sufficient evidence of pretext,' but evidence that overall reasonably supports a finding of discriminatory animus."); *Smith v. Stratus Computer, Inc.,* 40 F.3d 11, 16 (1st Cir. 1994) (once employer has rebutted prima facie case, "plaintiff must then introduce sufficient evidence to support two additional findings: (1) that the employer's articulated reason for the job action is a pretext, and (2) that the true reason is discriminatory."); *Henson v. Liggett Group, Inc.,* 61 F.3d 270, 275 (4th Cir. 1995) ("To withstand summary judgment, [plaintiff] must produce direct or circumstantial evidence 'of a stated purpose to discriminate [on the basis of plaintiff's protected status] of sufficient probative force to reflect a genuine issue of material fact.' " (citations omitted)); *Bodenheimer v. PPG Industries, Inc.,* 5 F.3d 955, 958 (5th Cir. 1993) ("We recognize that *St. Mary's* did not involve review of a summary judgment, whereas this case does. The case nonetheless is controlling as to what showing [plaintiff] must make to avoid summary judgment. In particular, because [plaintiff] would be required to prove at trial, through a preponderance of the evidence, that PPG's proffered reasons are a pretext for age discrimination, he must now produce sufficient evidence to establish that PPG's reasons were a pretext *for age discrimination.*").

Because of the enormous burden posed by defending an employment discrimination case through trial, it is critical that amici cities, and all employers, be permitted to avail themselves of summary judgment procedures. However, unless a plaintiff is required to come forward with evidence that discrimination was the real reason for the adverse employment action, which this Court in *St. Mary's* said is necessary to establish a case of employment discrimination, employers will be forced to defend unmeritorious claims through trial. The "Pretext Plus" standard utilized by courts in the First, Fourth, Fifth, and Sixth Circuits in employment discrimination cases properly allows defendants to obtain summary judgment in cases where the plaintiff cannot meet the appropriate burden of proof under *St. Mary's*.

B. "Pretext Only"

Courts in the Third, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have applied a standard whereby a plaintiff need only present evidence disputing the reasons given by the employer for the adverse employment action in order to avoid summary judgment. These courts do not require a plaintiff to meet the additional requirement of *St. Mary's* of showing that the reasons advanced by the defendant for the employment action is a pretext *for discrimination*.

For example, in *Howard v. BP Oil Company, Inc.*, 32 F.3d 520 (11th Cir. 1994), the court found that a plaintiff in an employment discrimination case need only show "evidence from which a jury could find that the articulated reasons are false" in order to create an issue of fact

sufficient to avoid summary judgment in an employment discrimination case. *Id.* at 525. The plaintiff in *Howard* claimed that the defendant failed to award him a BP station on the basis of his race. On summary judgment, the defendant presented evidence of several non-discriminatory reasons for the decision, including the experience of others who were awarded stations and familial relationships among those who were awarded stations. The plaintiff argued, in opposition to summary judgment, that the reasons proffered by defendant were inconsistent, subjective, and unworthy of credibility. However, plaintiff presented no additional evidence of discriminatory animus on behalf of defendant leading to the decision. The trial court, therefore, granted summary judgment.

The Eleventh Circuit Court of Appeals reversed, finding that the additional proof of discriminatory animus was unnecessary to avoid summary judgment.

> *St. Mary's* holds that *proof* that a defendant's articulated reasons are false is not *proof* of intentional discrimination; it is merely *evidence* of intentional discrimination. However, *evidence* of intentional discrimination is all a plaintiff needs to defeat a motion for summary judgment. That evidence must be sufficient to create a genuine factual issue with respect to the truthfulness of the defendant's proffered explanation. *Howard v. BP Oil Company, Inc., supra,* 32 F.3d at 525.

Courts in the Seventh, Eighth and Tenth Circuits have applied a similar analysis in their examination of summary judgment in employment discrimination cases.[2]

Courts in the Ninth Circuit have also applied a "Pretext Only" standard. In *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993) the court incorrectly applied *St. Mary's* when it found that plaintiff's evidence of pretext was sufficient to defeat the employer's summary judgment motion.

> Because, as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true.

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[2] *See, e.g., Anderson v. Baxter Healthcare Corp., supra*, 13 F.3d at 1124 ("However, for summary judgment purposes, the nonmoving party, in this case the plaintiff, has a lesser burden. He must only 'produce evidence from which a rational factfinder could infer that the company lied' about its proffered reasons for his dismissal."); *Krenik v. County of Le Sueur*, 47 F.3d 953, 958 (8th Cir. 1995) ("To survive summary judgment at the third stage of the *McDonnell Douglas* analysis, a plaintiff must demonstrate the existence of evidence of some additional facts that would allow a jury to find that the defendant's proffered reason is pretext and that the real reason for its action was intentional discrimination. These additional facts may be limited solely to proof of pretext . . . "); *Durham v. Xerox Corp.*, 18 F.3d 836, 839-40 (10th Cir. 1994) ("Although a prima facie case combined with disproof of the employer's explanations does not prove intentional discrimination as a matter of law, it may permit the factfinder to infer intentional discrimination, and thus preclude summary judgment for the employer.").

> Such a question cannot be resolved on summary judgment. *Id.* at 1433.

In *Wallis v. J.R. Simplot Co.*, 26 F.3d 885 (9th Cir. 1994), while affirming the District Court's grant of summary judgment, the court applied a "Pretext Only" standard.

> In response to the defendant's offer of non-discriminatory reasons, the plaintiff must produce 'specific, substantial evidence of pretext.' In other words, the plaintiff 'must tender a genuine issue of material fact as to pretext in order to avoid summary judgment.' (internal citations omitted) *Id.* at 890.

The Ninth Circuit Court of Appeals' decision in the instant case enunciated another form of the "Pretext Only" standard for summary judgment in employment discrimination cases. This standard requires the employee to *either* provide evidence of discrimination *or* show that the employer's reasons for the decision were pretextual.[3]

> Thus, Warren's burden at the summary judgment stage is not great. He cannot, however, rely on generalizations. He must produce evidence of facts that either directly show a discriminatory motive or show that the City's

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[3] The Third Circuit Court of Appeals has applied a similar standard. In *Sempier v. Johnson & Higgins*, 45 F.3d 724, 731 (3d Cir. 1995), the court held that "[A] plaintiff who has made out a prima facie case may defeat a motion for summary judgment by *either* (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action."

> explanation for his rejection is not credible. *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995).

The court went on to find that the Respondent, who had proceeded on a "Pretext" theory, offered sufficient evidence to raise an issue of fact as to Petitioners' *motive* in not promoting him. *Id.* at 444. The court did not, however, make any determination as to the reasons offered by the Petitioners for the adverse employment action. Thus, the court below failed to apply the proper standard set out in *St. Mary's* requiring plaintiff to present evidence sufficient to raise a question of fact in regard to both the veracity of the employer's proffered reason for the employment action *and* whether the real reason was unlawful discrimination.

The effect of a "Pretext Only" analysis of summary judgment on employment discrimination claims is that almost every case where the plaintiff meets the burden on the prima facie showing, regardless of merit, will proceed to trial. Such a standard renders summary judgment a useless exercise, rather than an integral tool for the "just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett, supra*, 477 U.S. at 327. Not only does such a standard conflict with many of the other Circuit Courts of Appeals, but it also ignores the holding of *St. Mary's* that a plaintiff must prove both that the defendant's proffered reason for the employment action is pretextual, and that it is pretext for intentional discrimination. Such a conflict, as well as the use of an improper standard, merits resolution by this Court.

CONCLUSION

The summary judgment standard applied by the Ninth Circuit Court of Appeals to justify reversal in this case directly conflicts not only with this Court's holding in *St. Mary's*, but also with many other Circuit Courts of Appeals. Courts of Appeals throughout the United States are incorrectly requiring employers, including public agencies like amici cities, to defend unmeritorious employment discrimination claims through trial. This unjust result would be remedied if the Courts of Appeals uniformly applied the correct standard on summary judgment as set out by this Court in *St. Mary's* which requires the plaintiff to produce sufficient evidence to raise a genuine issue of fact that the reason offered by the employer for the challenged employment action was not only a pretext, but also that the real reason was intentional discrimination.

Summary judgment is an extremely important tool for the just and efficient resolution of all cases. The burdens upon amici cities, and all employers, of defending such cases through trial are great. Therefore, amici cities respectfully request that this Court grant Petitioners' petition for a writ of certiorari and resolve the issue of the appropriate standard to be applied on summary judgment in employment discrimination cases.

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Respectfully submitted,

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